No. 14352

United States Court of Appeals

For the Ninth Circuit

SAM BLASSINGAME, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from Judgment and Sentence in the United States District Court for the Western District of Washington, Northern Division

REPLY BRIEF OF APPELLANT

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In their brief counsel for the government advance some rather extreme views. One of these is that in a prosecution for conspiracy such liberality is allowed that the indictment may charge a conspiracy to commit an offense against the United States by violating a particular statute, and then a conviction be sustained by showing a violation of *any* statute (p. 9).

This, of course, is not the rule. The indictment must identify the offense. *Wong Tai v. United States,* 273 U.S. 45, 47 S.Ct. 300, 71 L.ed. 545. In that case the supreme court said:

> "It is well settled that in an indictment for conspiring to commit an offense—in which the conspiracy is the gist of the crime—it is not necessary to allege with technical precision all the elements essential to the commission of the offense which is the object of the conspiracy, * * * or to state such object with the detail which would be required in an indictment for committing the substantive of-

> fense. * * * In charging such a conspiracy 'certainty to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that is necessary.' *Williamson v. United States,* 207 U.S. 425, 447, 52 L.ed. 290, 28 S.Ct. 163; *Goldberg v. United States,* 277 Fed. 213."

In the case at bar the indictment seems to have been designed to conceal from the appellant the nature of the offense with which he was charged. Upon the facts in possession of the government he could have been charged with the substantive offenses of transporting the female and/or procuring the ticket or tickets under 18 U.S.C.A., §2421, or of inducing her to go under §2422. But instead he was charged with conspiracy, not to commit any of the substantive offenses under §2421, but the offense of persuasion under 18 U.S.C.A., §2422. This was a deliberate choice on the part of the government as is evidenced by the fact that the defendants were charged with going on the line of a common carrier. If the violation was of §2421 the specification of a common carrier would have been unnecessary. In *United States v. Saledonis* (2nd Cir.) 93 F.(2d) 302, it was said:

> "Section 2 of the act [now §2421] provides punishment for anyone who knowingly transports, or causes to be transported, or aids or assists in obtaining transportation for, or in transporting in interstate commerce, any woman or girl for immoral purposes, or who knowingly obtains or causes to be procured or obtained, or aids or assists in procuring or obtaining, any ticket or tickets, or any form of transportation or evidence of a right thereto, for the movement in interstate commerce of a woman or girl for the immoral purposes re-

> ferred to in the statute. Transportation referred to in section 2 may be either by public or private carrier as long as it involves crossing state lines. But section 3 makes the offense the offering of an inducement by one who shall 'thereby knowingly cause' such woman to go on a common carrier, in interstate commerce. Thus there are two distinct crimes set forth in the statute. The act condemns transportation obtained or aided or transportation induced in interstate commerce for immoral purposes. * * * Section 2 makes it a felony to obtain or aid transportation for immoral purposes. Section 3 makes it a separate offense to induce a woman to go in interstate commerce on a common carrier for immoral purposes."

Moreover, the indictment charges the defendants with conspiring to "cause said Patricia Lewis to go and be carried as a passenger upon the line of a common carrier." These words are appropriate only under §2422. Under §2421 the offense lies in the transportation or procuring the ticket or tickets.

In *Graham v. United States,* 154 F.(2d) 325 (C.A. D.C.) the defendants were charged with *conspiracy* to "transport and cause to be transported * * * divers women" in the District of Columbia. The court said this was the substantive offense described in Section 2 of the act (§2421). The evidence showed that the women took taxicabs in keeping appointments made for them by the defendants for the purpose of prostitution in the city of Washington. The court said:

> "In our opinion they did not conspire to 'transport or cause to be transported.' The quoted words like most others, have no precise and invariable meaning. They might be used in so broad a sense

as to cover what the appellants did. But they were not so used in §2 of the Mann Act. This becomes clear when §2 is compared with §3. Section 3 makes it a crime to 'induce * * * any woman or girl to go from one place to another' and 'thereby knowingly cause (her) to be carried or transported as a passenger upon the line or route of any common carrier,' in interstate commerce or in the District of Columbia, etc., for the purpose of prostitution. We think Congress had a purpose in enacting §3. But if, as the government in effect contends, §2 covers mere inducement to travel for the purpose of prostitution when the prostitute is likely to and does get transportation for herself, then §3 serves no purpose because §2 covers every case to which §3 could possibly apply. If, as we think, §3 adds something to the meaning of the Act, the facts of the present case are not within §2.

"For several reasons, the conviction cannot be sustained on the theory that appellants conspired to violate §3. * * * (3) The record shows that the case was tried and the jury were instructed with reference to §2 only."

In *United States v. Barton,* 134 F.(2d) 484 (2nd Cir.), the court discusses the difference between the two separate crimes and what is required in the way of proof under each section. In *Kavalin v. White,* 44 F. (2d) 49 (10th Cir), it was held that the two sections stated separate crimes, that is, to procure a ticket under §2421 was separate and distinct from inducing the woman to go under §2422.

There is no reason why, if the government was in doubt as to which statute was violated, it could not have indicted the defendants for conspiracy to violate both

Sections 2421 and 2422. *Tobias v. United States,* 2 F. (2d) 361 (9th Cir).

Specific terms in a statute prevail over general terms.

> "General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment. * * * Specific terms prevail over the general in the same or another statute which otherwise might be controlling. * * * The construction contended for would violate the cardinal rule that, if possible, effect shall be given to every clause and part of a statute." *Ginsberg & Sons v. Popkin,* 285 U.S. 254, 76 L.ed. 704.

The rule has been applied to Mann Act cases and to the exact question under consideration. *La Page v. United States,* 146 F.(2d) 536 (8th Cir.); *Hill v. United States,* 150 F.(2d) 760 (8th Cir.). In these cases the defendant was charged with causing a woman to be transported in interstate commerce for the purpose of prostitution. The proof showed merely a telephone message to the woman long-distance, and that as a result of the conversation the woman went. It was held in each case that the proof did not support the charge.

But counsel for the government argue, apparently, that although the indictment is plainly laid under §2422, the conviction must be sustained if the proof shows guilt under some other statute. It is true that it is the practice in some district courts not to allege in the body of the indictment a violation of any statute, at least by number, but to note the number on the margin. It has been held in some cases, where the defendant could not possibly be misled, that an incorrect reference is not

fatal, and these cases are cited in appellee's brief. But these cases do not apply here. In the case at bar §2422 was twice referred to by number in the body of the indictment, and allegations were contained which could only be a part of the offense included in that section.

Appellant is not protected from prosecution under §2421 by the judgment here. It was held in this circuit in *Louie v. United States,* 218 Fed. 36, that a conviction on a charge of conspiracy was not a bar to a prosecution for aiding and abetting the same offense.

In using the word "cause" in the indictment in the case at bar the government meant inducing or persuading. The defendants were not charged with actually transporting, nor of procuring tickets. In *La Page v. United States,* 146 F.(2d) 536, 156 A.L.R. 965, *supra,* the defendant was charged with violation of §398, now §2421, with causing a woman to go in interstate commerce for the purpose of prostitution. The proof showed only inducement under the next section. It was held the conviction could not be allowed to stand. It was argued that causing a woman to go under §2421 was the same as inducing her to go under §2422. But the court held that the two sections stated different crimes, that §3 of the act (§2422) was of similar and narrower application that §2 (§2421).

In *United States v. Hutcheson,* 312 U.S. 219, 85 L.ed. 788, the indictment was laid under the Sherman Act. In ruling upon a demurrer to the indictment the court held that the later Clayton Act and the Norris-LaGuardia Act might be considered. These acts could be shown as taking the sting of criminal conduct out of the earlier

law. The case is not authority for the proposition that the grand jury may indict under one law, and the government prove guilt under another.

In *Williams v. United States,* 168 U.S. 382, 42 L.ed. 509, the *facts* were stated in the indictment. These facts did not establish a violation of the revenue laws, but did show a violation of a statute punishing extortion. The statute relating to the revenue laws was cited in the margin of the indictment, and the trial judge presumed that the indictment would lie under those statutes. The Supreme Court ruled that while the conviction could not be sustained under the revenue laws, it could be under the extortion statute.

In the case at bar appellant was led to believe that he would be called upon to defend under §2422, not only because of the two references to that section, but because of the facts stated which it would have been unnecessary to allege if the indictment had been intended under the other section. And the indictment does not make sense the way it is framed without the reference to the particular statute.

Counsel for the government are wrong when they argue (p. 7) that the indictment states an offense under §2421 where it is alleged that the defendants conspired to cause the woman to go. At the risk of repetition, we must point out that causing a woman to go is not a crime; the crime lies in transporting, or procuring tickets under §2421, or inducing under §2422.

The defendant was misled to his prejudice if the indictment is construed under §2421. No crime was shown, nor indeed could a crime be committed to conspire

under §2422. And Rule 12(b) (b) of the Federal Rules of Criminal Procedure, provides that the failure of the indictment to charge an offense shall be noticed by the court at any time during the pendency of the proceeding. This court has ruled that this means that if this appears the case should be dismissed on appeal. *Hotch v. United States,* 208 F.(2d) 244.

The many criticisms of the use of the conspiracy charge to obtain a conviction where it is doubtful that a charge of the substantive crime would stand up are climaxed by the opinion of the concurring judges in *Krulewith v. United States,* 336 U.S. 440, 93 L.ed. 790. What is said there is applicable to this case.

> "The modern crime of conspiracy is so vague that it almost defies definition. * * * The crime comes down to us wrapped in vague but unpleasant connotations. It sounds historical undertones of treachery, secret plottings and violence on a scale that menaces social stability and the security of the state itself. * * * But the conspiracy concept also is superimposed upon many concerted crimes having no political motivation. It is not intended to question that the basic conspiracy principle has some place in modern criminal law, because to unite, back of a criminal purpose, the strength, opportunity and resources of many is obviously more dangerous and more difficult to police than the efforts of a long wrongdoer. *It also may be trivialized,* as here, where the conspiracy consists of the concert of a loathsome panderer and a prostitute to go from Florida to New York to ply their trade, * * * *and it would appear that a simple Mann Act prosecution would vindicate the majesty of federal law.* However, even when appropriately invoked,

> the looseness and pliability of the doctrine present inherent dangers which should be in the background of judicial thought wherever it is sought to extend the doctrine to meet the exigencies of a particular case." (Italics ours)

The quoted language sems particularly pertinent in view of the argument of counsel for the government that although the charge is obviously framed under §2422, it should be construed as though founded on §2421. Appellant prepared his defense against a charge of conspiracy—not to transport; not to procure tickets; not to aid and abet these things—but for a conspiracy to induce and persuade the female to go. It is manifestly unfair now to say that he should have prepared himself to defend against a wholly different charge.

Respectfully submitted,

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